No. 86-522

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IN THE
Supreme Court of the United States
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COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT NATURAL GAS PIPELINE COMPANY OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL E. GOLDSTEIN
PAUL W. MALLORY *
PRISCILLA A. MIMS
701 E. 22nd Street
P.O. Box 1207
Lombard, IL 60148
(312) 691-2734
Attorneys for Respondent Natural Gas Pipeline Company of America

* Counsel of Record

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in affirming a holding by the Federal Energy Regulatory Commission (''FERC''or ''Commission'') that, with respect to the rate structure of a Natural Gas Pipeline Company, Colorado Interstate Gas Company (GIG), which had filed for increased rates, FERC could modify, as of the date of the revised rates became effective, existing tariff provisions which are part of GIG's rate design and are integral to the collection ot the revised rates.

STATUTES INVOLVED

Relevant portions of the Natural Gas Act, 15 U.S.C. §717 (Act), are included in the Appendix to CIG's Petition for Writ of Certiorari.

STATEMENT OF FACTS

The Petitioner, CIG, is an interstate natural gas transmission pipeline. CIG transports, and makes sales for resale, of natural gas in interstate commerce, serving Natural Gas Pipeline Company of America (''Natural'') and others. Such sales and transportation are subject to the jurisdiction of the Commission under the Act. Respondent Natural, which was an active Intervenor before the Commission and the United States Court of Appeals for the Tenth Circuit (Tenth Circuit), is also an interstate pipeline company subject to the Act. Natural purchases a portion of its natural gas supplies from CIG under CIG's Rate Schedules F-1 AND H-1 on file with the Commission. The Commission is a federal agency which is charged with the responsibility of regulating natural gas pipeline rates, charges and services (including CIG's sales to Natural under Rate Schedules F-1 and H-1) pursuant to the Act.

The minimum commodity bill at issue here is a component of CIG's rate structure under Rate Schedules H-1 and F-1 governing service to Natural. This provision required Natural to take-or-pay for ninety percent (90%) of the volume of gas to which it is contractually entitled.

On March 29, 1982, CIG initiated a general rate increase proceeding with the Commission pursuant to §4 of the Act, 15 U.S.C. §717c. This rate increase affected, *inter alia*, the rates charged to Natural under CIG's Rate Schedules H-1 and F-1. By order issued April 28, 1982, the Commission suspended the proposed rate increase until September 29, 1982, at which time the new rates became effective subject to refund. *Colorado Interstate Gas Co.*, 19 FERC ¶61,701.

On May 25, 1984, the Commission issued the order under review here, which held that CIG's minimum commodity bill as then in effect was not just and reasonable. *Colorado Interstate Gas Co.*, 27 FERC¶61,315. The Commission ordered CIG to modify the minimum commodity bill to preclude the collection of gas costs and other variable costs. The Commission made this ruling effective as of September 29, 1982, the date CIG's rate increase had become effective subject to refund. The Commission denied CIG's request for rehearing by order issued July 23, 1984. *Colorado Interstate Gas Co.*, 28 FERC ¶61,083. CIG appealed these orders to the U.S. Court of

of Appeals for the Tenth Circuit, which affirmed the Commission in full. That ruling by the Tenth Circuit is the subject of CIG's Petition for Certiorari.

SUMMARY OF REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari in this matter raises no issue warranting review by this Court. The extent of Commission's authority to review CIG's tariff provision incorporating its minimum commodity bill under §4 of the Act relates to the particular facts and circumstances present here, which were thoroughly reviewed by the Commission and the Tenth Circuit. No industry-wide issue is present.

Moreover, the Tenth Circuit's decision is fully consistent with interpretation of the Act by this Court and by other circuits. This Court has stated that a pipeline such as CIG filing a §4 rate proceeding assumes the risk of any change in rate design ordered by the Commission (such as the modification of the minimum commodity bill required here).

Other circuits have ruled that the Commission may review under §4 any tariff provision which interacts with the revised rate. The D.C. Circuit itself, which CIG contends has issued a decision in conflict with the order under review, has clearly so held and the case on which CIG relies--which involved two *separate* rates--is clearly distinguishable.

REASONS FOR DENYING THE PETITION

This appeal presents a narrow and fact-specific question as to whether the Commission exceeded its authority in a routine rate review by the Commission under §4 of the Act. The facts and circumstances surrounding the Commission's actions were fully and adequately reviewed by both the Commission and the Tenth Circuit. This Court and other circuits have affirmed the Commission's exercise of its §4 authority in similar circumstances. CIG has failed to present any arguments to justify review of this matter in which the Tenth Circuit merely applied recognized legal principles developed under the Act to the facts and circumstances of a particular case.

I. The Tenth Circuit's Decision is Fully Consistent With This Court's Rulings Regarding Commission Authority.

At issue here is a routine exercise of the Commission's authority under §4 of the Act. The Commission ruled that, in reviewing CIG's filing, it could also review and modify an existing tariff provision -the minimum commodity bill - which is integral to collection of the revised rate. The integral nature of this provision was explicitly found by the FERC and affirmed by the Tenth Circuit. CIG does not take issue with that finding here. To the extent Natural takes less gas than its minimum commodity bill level (which is the current situation), CIG can only collect its rates from Natural through the minimum commodity bill.

The Commission's review authority under §4 extends to any tariff provision that interacts with, or is integral to, the charging of the revised rates sought by the pipeline. Precedent before this Court and the various circuits support this proposition. This result is also consistent with the primary aim of the Act which is "to protect consumers against exploitation at the hands of natural gas companies..." and "to afford consumers a complete, effective bond against excessive rates and charges..." *Sunray Mid-Continental Oil Co. v. FPC*, 364 U.S. 137, 147 (1960), quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

This Court has held in *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), that a natural gas company filing under §4 of the Act assumes the risk of a change in rate design. Therefore, the Tenth Circuit decision upholding the Commission's ruling that modified the minimum commodity bill, an integral part of CIG's rate design, presents no question which is novel or poses a conflict with existing interpretation of the Act by this court.

In *Tennessee*, the Commission had ordered an interim rate reduction and refunds under §4 and left for future proceedings a determination of the pipeline's rate design ¢ specifically, the cost allocation among zones on a pipeline system divided into six separate geographic zones with separate rates. The pipeline objected on the grounds that if the Commission were to modify the rate design in subsequent proceedings, the pipeline might be unable to collect the cost of service allowed. This Court upheld the Commission's order on the grounds that, in filing a §4 case, the company assumed the risk inherent in a reexamination of its rate design. This Court stated in *Tennessee* (371 U.S. at 152-153):

> ...In addition, an analysis of the policy of the Act clearly indicates that a natural gas company initiating an increase in rates under §4(d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being "just and reasonable"...The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.

Thus, under *Tennessee*, the Commission has plenary authority pursuant to §4 of the Act to review and modify the design (which includes the minimum commodity bill) of a pipeline's rates which are involved in a §4 rate filing even if the pipeline itself has proposed no change in rate design but only in the overall level of rates.

Regulation of natural gas and administration of the Act are entrusted to the administrative expertise of the Commission. *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 617 (1944). The Commission also is accorded

deference as to its interpretation of its own orders and regulations issued pursuant to the Act and indeed to interpretation of the Act itself. *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984). *Mississippi Valley Gas Co. v. FPC*, 294, F.2d 588, 592 (5th Cir. 1961); *Signal Oil and Gas Co. v. FPC*, 238 F.2d 771, 774 (3rd Cir. 1956) *cert. denied*, 353 U.S. 922. Where, as here, the Commission's order has been affirmed by a Court of Appeals and is fully consistent with prevailing principles as expressed by this Court, no basis has been shown to warrant further review.

II. The Tenth Circuit Decision Is Consistent With Precedent From Other Circuits.

Other circuits have, consistent with this Court's ruling in the *Tennessee* case, held that a natural gas company filing revised rates assumes the risk of justifying any tariff provision or rate methodology which is an integral part of its rate structure, whether or not the filing company proposed a change in that aspect of the rate structure. *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984); *North Penn Gas Co. v. FERC*, 707 F.2d 763 (3rd Cir. 1983); *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982); *Laclede Gas Co. v. FERC*, 670 F.2d 38 (5th Cir. 1982).

In *North Penn*, the Third Circuit held that when "the company precipitated the rate examination by its §4 filing," the Commission was empowered under §4 to review and require a change in an existing rate methodologies which was an intergral part of the development of the revised rate (in that case, the method of valuing storage gas inventory) even though the company proposed no change in that methodology (707 F.2d at 769).

In *Batavia*, the D.C. Circuit held that the Commission has authority to review an existing fuel adjustment clause in conjunction with a filing of revised rates under §205[1] of the Federal Power Act (which corresponds to §4 of the Natural Gas Act)[2] The *Batavia* Court stated:

> ...It is not difficult to envision many situations where the interaction between a fuel adjustment clause and new components of a revised rate will make the operation of the clause itself unjust or unreasonable. If that happens, we cannot conceive that the Commission would be unable to subject the fuel adjustment clause to its suspension and refund authority. We certainly can find nothing - and the Commission has cited

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[1] 16 U.S.C. §824d(e).

[2] Parallel provisions in the NGA and the Federal Power Act are to be read in *pari materia*. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

> nothing - to command such an unlikely result. We are aware that this court recently rejected the notion that simply 'because a company files for higher rates, it bears the burden of proof on those portions of its filing that represent no departure from the status quo. *Transcontinental Gas Pipeline Corp. v. Federal Energy Regulatory Commission, 642 F.2d 1335, 1345 (D.C. Cir. 1980) (hereinafter Transco).* But we do not read *Transco* as precluding the Commission from reviewing a revised rate completely to assure that all its parts - old and new - operate in tandem to insure a 'just and reasonable' result and from ordering refunds if the previously approved fuel clause operates with new provisions to produce an over-recovery....

(672 F.2d at 76-77).

It is clear from this language that in *Batavia* the D.C. Circuit recognized Commission authority to subject to §4 review a tariff provision which interacts with the company's revised rates.

Similarly, the Fifth Circuit has stated in *Laclede*:

> We hold that when United filed pursuant to §4 to increase its rates, it assumed the hazard and opened to Commission scrutiny the propriety of the PGA clause contained within its rate schedule... Furthermore, where the PGA mechanism is such an integral part of the manner in which rates are charged, when the very rates being charged are allocated by application of the PGA clause, its provisions are necessarily a part of a filing for new rates subject to §4 scrutiny.

(670 F.2d at 41-42).

Natural would submit that the Tenth Circuit summarized the law both accurately and succinctly in its order challenged here by CIG (791 F.2d at 807):

> Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure that all parts of the structure - both old and new - operate together to produce just and reasonable rates. *See City of Batavia v. Federal Energy Regulatory Comm'n* 672 F.2d 64, 75-77 (D.C. Cir. 1982) (dealing with a similar section of the Federal Power Act, 16 U.S.C. §824d(e)). By filing the rate increase, a gas company assumes the risk of having to justify its entire rate structure, *see Federal Power Comm'n v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152, 83 S. Ct. 211, 215, 9 L.Ed.2d 199 (1962), including integral provisions of that structure which the company does not propose to change, *Florida Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 741 F.2d 1307, 1311 (11th Cir. 1984); *North Penn Gas Co. v. Federal Regulatory Comm'n*, 707 F.2d 763, 769 (3d Cir. 1983); *City of Batavia V. Federal Energy Regulatory Comm'n*, 672 F.2d at 75-77; *Laclede Gas Co. v. Federal Regulatory Comm'n*, 670 F.2d 38, 41-42 (5th Cir. 1982). A provision which serves as a charging mechanism is considered an integral part of a rate increase and a gas company's rate structure. *Cf. Laclede Gas Co. v. Federal Energy Regulatory Comm'n*, 670 F.2d at 41-42 (finding a purchased gas adjustment clause is necessarily a part of a new rate filing, and thus subject to §4 scrutiny, because it is 'an integral part of the manner in which rates are charged').

III. The Tenth Circuit's Decision Is Distinguishable From *Sea Robin*

CIG relies primarily upon *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1986) in support of its position that a conflict exists between the circuits. In fact, the holding in *Sea Robin* does not contradict the decision of the Tenth Circuit in this matter.

First, the D.C. Circuit in *Sea Robin* explicitly disclaimed any intention of overruling its prior precedents, including the *Batavia* case discussed in the previous section. As the D.C. Circuit stated: "City of Batavia neither contradicts nor limits our interpretation of Transco." (795 F.2d at 187). As noted in the previous section, the D.C. Circuit in *Batavia* clearly endorsed §4 review of a tariff provision which interacts with the revised rates.

Second, *Sea Robin* is readily distinguishable on its facts and circumstances. In *Sea Robin*, the Commission had ordered the allocation of additional costs to, and a corresponding change in the rate level for, a transportation service the rate for which the company had not proposed to change. This allocation resulted in lower rates for other services so that refunds were required of the company. *Sea Robin* did not involve, as does this case, a mechanism such as a minimum commodity bill required for the collection of a rate the company has

commodity bill required for the collection of a rate the company had proposed to revise. In other words, there was no interaction between the revised rates and an existing tariff provision which determined the actual charges as in *Batavia* or in this case. Instead, *Sea Robin* dealt with two separate rates, only one of which the company had proposed to change. Whether the D.C. Circuit in *Sea Robin* has unduly restricted the Commission's §4 authority may be an interesting question, but it is an irrelevant one here, since the D.C. Circuit's holding does not conflict with that rendered by the Tenth Circuit here.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

NATURAL GAS PIPELINE
COMPANY OF AMERICA

PAUL E. GOLDSTEIN
PAUL W. MALLORY*
PRISCILLA A. MIMS
701 East 22nd Street
P.O. Box 1207
Lombard, IL 60148
(312) 691-2734
Attorneys for Natural Gas
Pipeline Company of America

Joseph M. Wells
Of Counsel

*Counsel of Record

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